AIN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1124 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANABHAI LAXMANBHAI KANGAD - Applicant(s)
Versus
BHOGILAL GIRDHARLAL KOTAK & 2 - Opponent(s)

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Appearance :
MR MEHUL S SHAH for Applicant(s) : 1,MR SURESH M SHAH for Applicant(s) : 1,
MR RR TRIVEDI for Opponent(s) : 1 - 3.
MR BHAVESH P TRIVEDI for Opponent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 08/12/2005

ORAL JUDGMENT

The petitioner-original plaintiff-judgment creditor is before this Court being aggrieved of order passed by the learned 2nd Joint Civil Judge (Senior Division), Rajkot dated 30.11.1996 below Exhibits 1 & 49 in

Execution Application No.225 of 1983.

2. An application was given on 13th October 1995 requesting the Court that an order be passed directing the judgment debtor to execute a sale deed through a Commissioner. The petitioner-judgment creditor has annexed a sketch showing the land in question. The map also shows the land acquired for the road. The learned Judge has passed an order and directed the opponent to execute a registered sale deed in favour of the petitioner (judgment creditor) as per the decree, for the amount mentioned therein, in terms of 'the agreement to sell' of the land admeasuring 1209 sq. yards within thirty days from the date of the order. While passing the order the learned Judge has added one condition that the judgment creditor shall hand over the possession of the excess land in addition to 1209 sq. yards, which he is in possession. The learned Judge has also said that only thereafter, the sale deed is to be executed.

3. Mr.Shah, the learned advocate appearing for the petitioner-judgment creditor invited attention of the Court to the decree. There it is stated that the judgment creditor shall deposit an amount of Rs.1974.25 paise which remained due in terms of 'the agreement to sell'.

On such amount being deposited the judgment debtor shall execute a sale deed in favour of the judgment creditor of the land details of which are mentioned in the plaint. The expenses to be borne by the judgment creditor, the stamp duty payable be also paid by the judgment creditor. Clause (iv) of the decree is important. It is mentioned therein that possession of the land is that of the judgment creditor and that is mentioned in para 9 of the suit (plaint).

4. Thus, it is clear from the decree that it directs only the 'execution of sale deed' and not 'handing over possession'. The fact that the possession of the land is already with the judgment debtor, is also noted in the decree. That being so, the learned Judge could not have added a condition of handing over the possession of the land in excess to the land of which sale deed is to be executed by the judgment debtor.

5. The learned advocate Mr.Trivedi appearing for the judgment debtor vehemently submitted that the order under challenge is absolutely in accordance with law. He submitted that it is an order passed under Section 47 of the Code of Civil Procedure (“the Code” for brevity). He submitted that the learned Judge has rightly directed the

judgment creditor to hand over the possession of the excess land to the judgment debtor before execution of sale deed. He submitted that as the phrase used in section 47(1) of the Code is:

> “All questions arising between the parties to the suit in which the decree was passed, ..

The learned Judge is right in passing such order so as to resolve the question of possession of excess land. The submission of Mr.Trivedi is not only not well founded, but is also far fetched. The learned Judge has addressed himself to the question of possession of excess land. All questions arising between the parties cannot be interpreted to mean 'Any question existing between the parties'. To test the argument of the learned advocate for the respondent, it is to be applied to another set of hypothetic facts. Suppose the judgment creditor was a tenant in the premises owned by the judgment debtor then whether the Court could have directed the judgment creditor to vacate the premises tog get the sale deed executed?

In the present case it is not the case of the judgment debtor that while executing the decree under which

possession was required to be handed over, by mistake, possession of some excess land was handed over to the judgment creditor and therefore, a question arises between the parties and the Court is required to consider the question of possession of excess land being restored. It is on record that in the present case, the decree was only for 'executing the sale deed'. The Court has taken note of the fact that possession of the land was already with the judgment creditor as is mentioned in para 9 of the plaint/suit. That being so, the judgment debtor cannot be allowed to get his question of possession of excess land settle with the judgment creditor, even assuming that at some point of time, the judgment creditor has encroached upon same land of the judgment debtor. If the submission of Mr.Trivedi is accepted then all disputes between the parties which may happen to be the judgment creditor and the judgment debtor will be required to be resolved by the 'executing' Court, be it a question relating to a 'will' under Section 125 of the Code of Civil Procedure or any other dispute between the parties, including disputes to which criminal law applies. Such argument cannot be accepted by this Court. This Court cannot read section 47 of the Code as suggested by Mr.Trivedi.

6. Learned advocate Mr.Trivedi submitted that this very petitioner-judgment creditor has approached the Court of the learned 4th Extra Assistant Judge, Rajkot in Regular Civil Appeal No.2 of 1997. In that appeal the Court had recorded a finding that order passed by the court below (the one which is under challenge in this Civil Revision Application) is just and proper. However, the very court had held that appeal is not maintainable and therefore, the same is disposed of with cost. Mr.Trivedi submitted that this Civil Revision Application be held to be not maintainable because the party has approached the District Court by filing appeal against the same order.

If this submission of Mr.Trivedi is accepted then any person who has by mistake pursues wrong remedy, will not be allowed to correct his mistake because once a person commits mistake, he must continue with the same. In the considered opinion of this Court, this submission of Mr.Trivedi is also without any merit or substance. Hence the same is rejected.

7. Mr.Trivedi relied upon the following decisions.

(i)In the matter between **Gopalkrishna Kammath Vs. R. Bhaskar Rao,** reported in A.I.R. 1989 Kerala 251. Though

this Court is of the opinion that the said decision has no application to the facts of the case, the same is discussed only to point out that without appreciating the facts of the case on hand and the facts of in the case of which decision is cited, the learned advocate is placing reliance on the decision. The High Court of Kerala was pleased to hold that the question as to excess execution, namely, the property not covered by decree delivered to decree holder in execution of decree, is a question which can be attended to under section 47 of the Code. In the case on hand it is not the case of the judgment debtor that the judgment creditor was handed over possession of excess land and therefore, the executing court shall restore the possession of that excess land. Even at the cost of repetition, it is to be reiterated that in the present case possession of land was already with the judgment creditor and no possession of land was ordered to be handed over to the judgment creditor under a decree. The decree was limited only to the execution of a sale deed. Therefore, this decision of Kerala High Court has no application to the facts of the present case.

8. The learned advocate next relied upon a decision of the Bombay High Court in the matter of **Dr.Madhukar**

Trimbak Gore Vs. Vasant Ramkrishna Kolhatkar, reported in A.I.R. 1983 Bombay 277. The learned advocate relied upon the following observations of the Bombay High Court in para 19,

> "19. When in execution a question arises as to the identity of the property of which possession has to be delivered to the decree-holder, obviously such a question would relate to the execution of the decree and it would be for the executing court to decide it as required by subsection (1) of section 47 of the Code, since it would not be possible for the decree-holder to get it determined by a separate suit. The proposition is so obvious so as not to need any authority. .. .. In this case also the executing court would do well to hold a proper inquiry and determine the question with regard to the identity of the room which has to be delivered, to the applicant."

In the case on hand there is no question of determining the identity of the property as there is no decree for handing over possession. It is the case of the judgment creditor right from day one that he is already in

possession of the land in question and what is required to be done is only 'execution of a sale deed'. If the case of the judgment debtor is that the judgment creditor has encroached upon the land of the judgment debtor, the remedy lies elsewhere and not before the executing court. In the present case, the suit was filed for a direction that the defendant be directed to execute a sale deed in favour of the plaintiff in terms of the 'agreement to sell'. That being so, encroachment, if any, by the judgment creditor on some excess land of the judgment debtor, cannot be a question which can be resolved in the present proceedings. The decision of the Bombay High Court has no application to the facts of the present case.

9. The learned advocate next relied upon a decision in the matter of **Babul Ali Vs. Smt.Khirada Dutta and others,** reported in A.I.R. 1983 Guwahati 56. In this decision also, there was 'excessive execution of the property'. In such circumstances, it is the duty of the executing Court to resolve such question. There is no application of this case to the facts of the present case as in the case on hand there is no question of any excess land being handed over to the judgment creditor while executing the decree.

10. Last, but not the least, the learned advocate, Mr.Trivedi relied upon a decision of the Hon'ble the Supreme Court in the matter of Bhavan Vaja and others Vs. Solanki Hanuji Mansang and another reported in A.I.R. 1972 SC 1371, wherein the Hon'ble the Apex Court has described the duties of the executing court as under:

> “It is true that the executing court cannot go behind decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree, the court often has to ascertain the circumstances under which these words came to be used. That is the plain duty of the executing court and if that court fails to discharge that duty it would be deemed to have failed to exercise the jurisdiction vested in it.”

11. In the considered opinion of this Court, precisely

this is the exercise undertaken by the Court. The decree passed is perused and it is noticed that the Court has not ordered for handing over the possession of land by way of execution. The Court has passed a decree directing the defendant (judgment debtor) to execute a sale deed. A specific note is taken of the fact that the judgment creditor is already in possession of the property.

12. In the opinion of this Court, the executing court has traveled beyond the decree while passing the order and adding the aforesaid condition for execution of sale deed. Hence, the order is modified to that extent. The direction asking the judgment creditor to hand over the possession of the excess land is hereby quashed and set aside. The judgment debtor is directed to execute the sale deed in favour of the judgment creditor of the land which is mentioned in the suit, which is also mentioned in Exh.49-application. The sale deed be executed within six weeks from the date of receipt of this order.

13. The Civil Revision Application is allowed. Rule is made absolute. No order as to costs.

(RAVI R. TRIPATHI, J.)

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